U.S. Department of Labor Board of Alien Labor Certification Appeals
800 K Street, N.W.
Washington, D.C. 20001-8002

DATE: December 1, 1997

CASE NO.: 95-INA-00059

In the Matter of:

STUART AND SHERRI LEIBOWITZ
Employer

On Behalf Of:

ROSALIND BROOMES
Alien

Appearance: James J. Orlow, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On April 27, 1993, the Employer filed an application for labor certification to enable the Alien to fill the position of Cook/Housekeeper at the hourly wage of $5.68 (AF 69-72). The job duties were described on the application as follows:

> Plan and prepare all meals according to recipes or tastes of employer. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. May provide child care during temporary absence of babysitter. Light housekeeping.

The Employer listed no educational requirements but did require two years of experience in the job offered. Although the application did not specifically include a live-in component, the employee contract did, in fact, provide room and board (AF 46).

On November 9, 1993, the CO issued a Notice of Findings ("NOF"), in which he stated that the Employer was in violation of a number of regulations, including a wage rate that is below the prevailing wage for the position and the requirement of a live-in component (AF 55-62). In response thereto, the Employer readvertised the position at the same wage rate but removed the live-in requirement (AF 49). On January 18, 1994, the Employer submitted its rebuttal response (AF 35-50).

On March 28, 1994, a second NOF was issued again proposing to deny certification. The sole grounds for the denial in this NOF was that the experience requirement was unduly restrictive, in violation of 20 C.F.R. § 656.21(b)(2).[2] In so finding, the CO stated that the job for which certification is requested had been recoded to that of Houseworker, General, D.O.T. 301-137-010 (AF 28-30). The CO then stated that the requirement of two years of experience exceeds the maximum as defined in this D.O.T. classification, which provides that the normal requirements for this occupation are one month up to and including three months of combined education, training, and experience. The Employer was instructed to either establish a business necessity for the experience requirement or to reduce or delete the requirement with attending readvertisements and postings.

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[1] All further reference to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

[2] Although the CO did not specifically find that the Employer had rebutted the other issues raised in the First NOF, he also did not preserve those issues. Therefore, we consider only the single issue raised by the CO in the Second NOF.

On April 28, 1994, the Employer submitted rebuttal to the second NOF (AF 20-27). The Employer contested the reclassification to Houseworker, General, pointed out that the CO had cited an incorrect D.O.T. code and also speculated that the CO had probably intended to reclassify the position to D.O.T. code 301-474-010.

On July 14, 1994, the CO issued a Final Determination denying labor certification for the Alien named herein on the grounds that the Employer failed to rebut the earlier findings that the application contained unduly restrictive requirements (AF 16-19). The CO further stated that he concurred that the correct code for the position is 301-474-010.

On August 18, 1994, the Employer submitted a request for reconsideration, stating that the CO had incorrectly concluded that the Employer accepted the reclassification (AF 13-15). On August 25, 1994, the CO denied the Employer's request (AF 12). On September 19, 1994, the Employer requested review before the Board of Alien Labor Certification Appeals (AF 1-11). On November 16, 1994, the Employer submitted a Statement of Position and a Motion to Remand.

Discussion

The Employer argues that the Final Determination is defective because the CO incorrectly states that the Employer had accepted the change in classification of the position to that of Housekeeper, General, under D.O.T. code 301-474-010. The Employer maintains that it did not accept the reclassification. In the Employer's rebuttal to the second NOF, they stated that it is respectfully submitted that the classification originally attached to the application was erroneously changed and continued to maintain that the position is that of a cook.

In the Final Determination, the CO stated as follows:

> Given the fact that the occupational title had been changed from Cook to Houseworker, General and the employer recognized same, the employer's rebuttal was to address the issue of unduly restrictive job requirements of 2 years experience for a Houseworker.

Nonetheless, the CO later addressed the issue of whether the job reclassification was proper and acknowledged that the Employer was maintaining "that the reclassification of the position from Cook to Houseworker, General is not appropriate because cooking is the principal duty and the additional duties are incidental." The CO again discussed whether or not the duties described in the application for labor certification were those of a cook or those of a housekeeper and concluded that they were the former.

However, we feel this case must be remanded for further consideration for two reasons. First, the Second NOF failed to specify that the question of proper classification was in issue and only instructed the Employer to respond to the issue of the appropriate length of experience for a housekeeper. Second, in the Final Determination, the CO gave conflicting interpretations of the Employer's stand in regard to the classification of the position. Even though the CO did repeat his reasoning for rejecting the classification of "cook" in the Final Determination, the primary focus was on the issue of the restrictive experience requirements for a housekeeper. We are, therefore, remanding this case for findings consistent with this opinion.

In revisiting this case, the CO should be mindful of our findings in related cases that the D.O.T. is used as a guideline, and it should not simply be applied mechanically. See *Promex Corp.*, 89-INA-331 (Sept. 12, 1990). The CO should further review the four affidavits of record submitted by the Employer, which give varying and arguably inconsistent reports of the job responsibilities for this position.[3]

ORDER

This matter is hereby REMANDED to the Certifying Officer for further findings consistent with this Order.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.

[3] The Employer also argues that the CO's denial was influenced by illicit interference in the adjudicative system because of directives issued by the Secretary of Labor. Because we have no jurisdiction beyond the regulations promulgated under the Act, this issue cannot be addressed.